

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2013-000108-001 DT

05/28/2013

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

PROGRESSIVE HOME INSURANCE  
COMPANY

TIMOTHY L MOULTON

v.

RODNEY W SAMPSON (001)  
APRIL EDWARDS (001)

RODNEY W SAMPSON  
1718 E FLOWER ST  
PHOENIX AZ 85016  
APRIL EDWARDS  
1718 E FLOWER ST  
PHOENIX AZ 85016

ARCADIA BILTMORE JUSTICE  
COURT  
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

**Lower Court Case No. CC2011136456 RC.**

Defendants-Appellants Rodney Sampson and April Edwards (Defendants) appeal the Arcadia Biltmore Justice Court's determination finding Plaintiff properly served them. Defendants contend the trial court erred. For the reasons stated below, the Court reverses the trial court's judgment.

**I. FACTUAL BACKGROUND.**

On July 1, 2011, Kathleen M. Kassman, on behalf of the Moulton Law Firm, wrote a letter jointly addressed to Rodney W. Sampson and April Edwards informing both that the firm had been retained to prosecute a legal action for damages resulting from a car crash. The law firm maintained Defendants were responsible for the accident. This letter was addressed to (1) Defendant Rodney W. Sampson at 1718 E. Flower Street, Phoenix, Arizona, 85016 and (2) to co-Defendant, April Edwards, at 2138 W. Washington St., Apt. 1, Phoenix, Arizona, 85009. The letter included a demand that the recipients—Defendants—contact the Moulton law firm within 7 days of the date of the letter to (1) acknowledge the demand letter; and (2) make payment arrangements. The letter concluded with the demand that if Defendants felt they were not legally responsible or otherwise felt legal action was unjustified, that Defendants contact the law firm.

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On July 7, 2011,—less than the 7 days from the date of the demand letter—Plaintiff filed a tort-Motor Vehicle Subrogation lawsuit at the Downtown Justice Court naming Defendants as the responsible parties.<sup>1</sup> Thereafter Plaintiff attempted to have Defendants served with this lawsuit. The process server—EZ Messenger—detailed the attempts to serve Defendant at the Flower Street address. The affidavit of attempted service reflects the process server attempted to serve Defendant and Jane Doe Sampson on July 16, 2011 at 11:32 am and the parties were “not at given address.” The process server also checked boxes on the form which indicated he checked phone and cross directories, I-411, the EZM data base, and the County Assessor’s office. The Attachment of Attempts indicated the process server also spoke with an unnamed neighbor on July 16, 2011. The attachment stated:

07/16/11 11:28 am by MARK MANLEY MOVED. [Sic.] Spoke with neighbor, address unknown.

07/18/11 1:40 pm by MARK MANLEY CURRENT RESIDENT GLEN REILEY STATED RODNEY W. SAMPSON MOVED OUT AND HIS CURRENT WHEREABOUTS ARE UNKNOWN.

The Attachment of Attempts was signed under the penalty of perjury.

Counsel asserted there were at least two separate attempts to serve Defendant April Edwards: (1) an attempt on July 15, 2011, at 2138 W. Washington St., Phoenix where the process server wrote Defendant Edwards was not at the address; and (2) a second attempt at the same address where the process server indicated the apartment was vacant.

There were no further attempts at service until October, 2011, when the process server tried to server Defendant Sampson at 3707 E. Amelia Avenue, Phoenix, AZ. The Affidavit of Service (AOS) for this attempt indicated Defendant Sampson was not at the address, and included the process server checked the EZM database, the County Assessor’s office, I-411, and “available” phone/cross directories. This AOS contained an Attachment of Attempts indicating the process server—Mr. Manley—(1) spoke with an unnamed neighbor who said the addressee was unknown on 10/9/2011; and (2) spoke with the current resident on 10/10/11 who said Defendant Sampson is the son of his father’s ex-girlfriend but he had not seen or heard from Defendant Sampson for over eight years.

Plaintiff made an additional attempt to serve Defendant Edwards in November, 2011. The AOS indicated two attempts to serve Ms. Edwards at 2138 W. Washington St. #3, on November 10, 2011. The first, at 11:05 a.m., stated “unknown at address attempted; while the second attempt, at 4:35 p.m. resulted in the process server—Ernad Cajic— speaking with “a Caucasian male who stated April Edwards is unknown.”

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<sup>1</sup> July 1, was on a Friday in 2011. July 2 and 3 were weekend days and July 4, a national holiday, fell on Monday. Although the A.R.C.P. do not apply to letters as opposed to pleadings, counsel’s letter did not provide Defendants with much opportunity to respond to their seven-day demand as the letter would likely not have been delivered until July 5.

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Plaintiff's counsel—on November 10, 2011—filed a Motion To Enlarge Time For Service of Process which requested the opportunity to serve process by publication and certified mail. Plaintiff's counsel wrote they believed Defendants were avoiding service. Counsel first asserted the motion was filed on the grounds that Plaintiff attempted to serve Defendant Sampson at 1715 [sic.] E. Flower St. and the “process server advised that the current resident stated that Mr. Sampson had moved out and his whereabouts was unknown.” Counsel attached copies of the process servers' statements of the several attempts at service to the motion. The motion included other addresses “plaintiff developed” and referred to Plaintiff's continued attempts to serve Defendants at different locations. However, the Motion also noted Plaintiff's initial mail sent to the E. Flower address resulted in Defendant Sampson contacting Plaintiff. Plaintiff's counsel did not refer to any further attempt to contact Defendants by mail or to seek information from the U.S. Post Office about any change of address. Plaintiff's counsel wrote they believed Defendants were avoiding service. The Motion—which was not filed until November 10, 2011,—included the deadline for service was November 9, 2011.

On November 21, 2011, the trial court granted Plaintiff's counsel's request and enlarged the time for service of process until February 9, 2012. The trial court did not address the request for service by publication or certified mail. Thereafter, Plaintiff proceeded to serve Defendants by publication. Counsel had notice about the action published for four consecutive weeks during December, 2011.<sup>2</sup>

On January 18, 2012, Plaintiff's counsel, Kathleen M. Kassmann, filed a Corrected Declaration of Kathleen M. Kassmann Pursuant to Rule 80(i) Ariz. R. Civ. Pr., re Completing of Service of Process on January 18, 2012, (Corrected Declaration) under penalty of perjury. In that Corrected Declaration—at p. 2 # 3—Ms. Kassmann stated:

Initial mail sent to 1718 E. Flower St., Phoenix, AZ 85016 resulted in Defendant Sampson contacting Plaintiff's counsel and denying responsibility for the motor vehicle accident which is the subject matter of this suit.

The 1718 E. Flower St. address is the same address as was indicated in the traffic citation issued to Defendant Rodney W. Sampson on July 19, 2010. Counsel continued her Corrected Declaration—p.2, # 4—and (1) said Plaintiff “then developed a further address for Defendant Sampson of 3707 E. Amelia Avenue, Phoenix, AZ., 85018;” but (2) reported her process server advised her Defendant Sampson was related to the residents but did not live at the address.

On January 18, 2012, the same date that Plaintiff's counsel filed her Corrected Declaration—Defendant Sampson filed an Answer on behalf of himself and April Edwards. In the Answer, he wrote:

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<sup>2</sup> The Arizona Business Gazette Affidavit indicates the advertisement of the law suit was published in the newspaper on December 1, 2011, December 8, 2011, December 15, 2011, and December 22, 2011.

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I admit no portions of the Complaint. Shortly after the accident I spoke with Progressive Ins. and provided them with a witness who gave a statement and has not contacted since.

In his Answer, he alleged the plaintiff was not entitled to judgment because of “See attached.” His attached statement said:

The Plaintiff is not entitled to judgment because:

I insist that I was not at fault. In fact, Ms. Lewis apparently was trying to pass me on the right as I exited the freeway off-ramp; there is a witness who corroborates this.[Sic.]

In addition, the Extension of Time to serve process should not have been granted. The process server perjured himself on the Affidavit of Attempted Service: we do reside at 1718 E. Flower, Phoenix, and he did not speak to either of my neighbors. Nor did he speak to my landlord, Glen Reiley (who is listed as “current resident.”) Phone numbers, etc., will be provided upon request. [Sic.]

Following an unsuccessful pre-trial conference, the trial court—on March 8, 2012—set the case for trial for May 10, 2012, at 1:00 P.M.

At trial, Defendant attempted to protest the setting of the trial. After first requesting the assistance of counsel and being informed that counsel was not appointed in civil matters Defendant Sampson asserted:

Mr. Sampson: I’m trying to - - I’m going to dismiss for the perjury committed nonstop –

The Court: Okay

Mr. Sampson: -- or violated to find me.<sup>3</sup>

The trial court then interrupted Defendant Sampson to tell the parties to begin with an opening statement. Defendant, for his opening statement, said:

I’d like to have it dismissed for the fact of the perjury nonstop committed by both the process server at the time, and the time that’s allowed and that’s all.<sup>4</sup>

Defendant began his defense by requesting leave to cross-examine Plaintiff’s counsel about a witness who allegedly made a telephonic statement to Plaintiff’s counsel more than two years earlier.<sup>5</sup> Defendant claimed he was unable to find the witness to subpoena him after more than two years.<sup>6</sup> Defendant also asserted Plaintiff’s process server committed perjury and maintained

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<sup>3</sup> Trial Transcript, May 12, 2012, at p. 6, ll. 18–23.

<sup>4</sup> *Id.* at p. 8, ll.7–9.

<sup>5</sup> *Id.* at p. 77, ll17–25; p. 78; p. 79, ll. 1–9.

<sup>6</sup> *Id.* at p. 78, ll. 10–14.

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he lived at the same address for the entire time.<sup>7</sup> He claimed the process server never tried to serve Defendants and never spoke with Glen Riley or Defendants' neighbors.<sup>8</sup>

Prior to cross-examining Defendant, Plaintiff's counsel averred she believed the process server issue was ruled on during the pre-trial conference. The trial court made no further finding about the service issue. Thereafter the trial court found Defendants responsible for the car accident.

Defendants filed a timely appeal. Plaintiff failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUES:

A. *Did Defendants Properly Present Their Issues On Appeal.*

Defendants submitted a memorandum that failed to cite to the record. Accordingly, Defendants' appellate memorandum failed to comply with Rule 8(a)(3), Super. Ct. App. P.—Civil, (SCRAP—Civ.) which states:

Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

When a litigant fails to include citations to the record in an appellate brief, the court may disregard that party's unsupported factual narrative and draw the facts from the opposing party's properly-documented brief and the record on appeal. *Arizona D.E.S. v. Redlon*, 215 Ariz. 13, 156 P.3d 430 ¶ 2 (Ct. App. 2007). Fundamental error aside, allegations that lack specific references to the record do not warrant consideration on appeal, *State v. Cookus*, 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977), Fundamental error rarely exists in civil cases. *Monica C. v. Arizona D.E.S.*, 211 Ariz. 89, ¶¶ 23-25, 118 P.3d 37 ¶¶ 23-25 (Ct. App. 2005).<sup>9</sup> See also *Bradshaw v. State Farm Mutual Automobile Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (doctrine of fundamental error in civil cases may be limited to situations when a party was deprived of a constitutional right). Here, Defendant did not demonstrate fundamental error.

It is not enough to merely mention an argument. Briefs must present significant arguments supported by authority that set forth the appellant's position on the issues raised. Failure to argue a claim usually equates with abandonment and waiver of the claim. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). The Court is not required to become the advocate for the litigants and search the records and exhibits to substantiate a party's claims. *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984).

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<sup>7</sup> *Id.* at p. 80, ll. 12-25.

<sup>8</sup> *Id.* at p. 80, ll. 19-24; p. 81, ll. 1-12.

<sup>9</sup> Courts apply the fundamental error doctrine sparingly. Fundamental error goes to the case's very foundation that prevents a party from receiving a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 ¶ 19 (2005).

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However, SCRAP—Civ. Rule 8(a)(5) provides the Superior Court may modify or waive the requirements of this rule to insure a fair and just determination of the appeal. Because (1) this Rule allows this Court to waive compliance with the mandates of SRAP—Civ. Rule 8(a)(3); and (2) Plaintiff did not object to the form of Defendant’s memorandum, this Court shall waive strict compliance with these rules in this case.

*B. Did The Trial Court Err By Finding Valid Service.*

Throughout these proceedings, Defendants challenged the service of process as being (1) untimely; (2) invalid; and (3) based on perjury. This Court notes Plaintiff served Defendants by publication. The trial court erred in allowing service by publication for several reasons. First, although Plaintiff requested it be allowed to be served “by publication and certified mail,” the trial court did not grant Plaintiff’s request.

**Due Diligence**

To be able to serve by publication, a party must demonstrate due diligence. Plaintiff failed to demonstrate due diligence because Plaintiff’s counsel did not exhaust the opportunities for locating Defendants that were readily available. Plaintiff failed to comply with the mandates of A.R.C.P., Rule 4.1(m) which states in relevant part:

The party or officer making service shall file an affidavit showing the manner and dates of the publication and the mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith.

In *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 798 P.2d 395 (Ct. App. 1990) the Arizona Court of Appeals discussed service of process by publication following two attempts at personal service. In *Sprang v. Petersen Lumber, Inc.*, *id.*, a copy of the summons and complaint was (1) mailed to a post office box as listed as the address on Mr. Sprang’s tax records and (2) attempted to be served at Mr. Sprang’s home which was found to be vacant. Thereafter, Mr. Sprang was served by publication. The Plaintiff filed an affidavit of service by publication and indicated (1) Mr. Sprang’s residence was unknown; and (2) Plaintiff exercised due diligence in trying to ascertain Mr. Sprang’s whereabouts. The Court of Appeals found this affidavit was insufficient. *Id.*, 165 Ariz. at 261, 798 P.2d at 399. The Court of Appeals stated:

Before resorting to service by publication, a party must file an affidavit setting forth facts indicating it made a due diligent effort to locate an opposing party to effect personal service. *Omega II Investment Co. v. McLeod*, 153 Ariz. 341, 342, 736 P.2d 824, 825 (App. 1987); Rule 4(e) (3),<sup>10</sup> Arizona Rules of Civil Procedure. A “due diligent effort” requires such pointed measures as an examination of telephone company records, utility company records, and records maintained by the county treasurer, county recorder, or similar record keepers.

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<sup>10</sup> This is a predecessor to Rule 4.1(m).

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*Id.*, 165 Ariz. at 261, 798 P.2d at 399. The Court of Appeals continued and held the record on appeal indicated the postal service records, the utility company records, and the records at the Navaho County Assessor's office would have revealed information about Mr. Sprang's current address. The Plaintiff in *Sprang, id.*, did more due diligence than was done by the Plaintiff in the case before this Court.

Defendants asserted they lived at the Flower Street address since 2008. In addition, Plaintiff's counsel was able to contact Defendants at that address in July, 2011, only weeks before Plaintiff filed suit and attempted to have Defendants served. Yet the Plaintiff only sent a process server out twice to the address Plaintiff's counsel knew—or had reason to know—belonged to Defendant Sampson. Plaintiff did not send a second letter to the Flower Street address even though the first letter resulted in Defendants contacting Plaintiff's counsel. Plaintiff did not attest to contacting the U.S. Post Office to see if Defendants filed any change of address form. There is no information about anyone performing a skip trace for Defendants. Additionally, the process server only made limited attempts to locate Defendants at that address and, instead, relied on comments from an unidentified third party about whether Defendants lived at the Flower Street address.

Plaintiff's counsel did not aver to efforts to use (1) the many databases available on the Internet; (2) Westlaw; or (3) LEXIS/NEXIS. Plaintiff's counsel did not reference any attempts to check utility company records, DMV, use a private investigator, or search the myriad sources available for locating individuals. Indeed, the only efforts to locate Defendant appear to be from the limited attempts made by the process server and detailed in his affidavits of service. Mr. Manley's AOS indicates a look at unnamed "available" reverse directories, an EZM database, the County Assessor's office, and using the I-411. The AOS does not indicate which reverse directories were checked or how often these "available" directories were updated, nor did it define the term "available." The attached statement did not indicate how extensive the EZM database is, what it contains, or how it is kept. The County Assessor's office shows owners of property and not renters. I-411 is the equivalent of an Internet based phone directory. Simply put, Plaintiff needed more due diligence than Plaintiff's counsel provided before Plaintiff could resort to service by publication, particularly in light of its recent successful contact with Defendants.

The Court of Appeals commented on the need for "heightened" due diligence when serving by publication in *Blair v. Burgener*, 226 Ariz. 213, 218, ¶ 14, 245 P.3d 898, 903 ¶ 14. In addition, in *Brennan v. Western Sav. And Loan Ass'n*, 22 Ariz. App. 293, 296 526 P.2d 1248, 1251 (Ct. App. 1974) the Court of Appeals held "Due diligence in trying to serve the summons personally is required before jurisdiction through publication will be granted." The Court of Appeals continued and ruled: "It is not enough to state that residence is unknown without setting forth the efforts made to locate the party." *Id.* Plaintiff fell short of this heightened due diligence requirement.

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**Jurisdictional Requirement**

A.R.C.P. Rules 4.1 1 governs service of process by publication.

**(1) Service by Publication; Return.** Where the person to be served is one whose residence is unknown to the party seeking service but whose last known residence address was within the state, or has avoided service of process, and service by publication is the best means practicable under the circumstances for providing notice of the institution of the action, then service may be made by publication in accordance with the requirements of this subpart. Such service shall be made by publication of the summons, and of a statement as to the manner in which a copy of the pleading being served may be obtained, at least once a week for four successive weeks (1) in a newspaper published in the county where the action is pending, and (2) in a newspaper published in the county of the last known residence of the person to be served if different from the county where the action is pending. If no newspaper is published in any such county, then the required publications shall be made in a newspaper published in an adjoining county. The service shall be complete thirty days after the first publication. When the residence of the person to be served is known, the party or officer making service shall also, on or before the date of the first publication, mail the summons and a copy of the pleading being served, postage prepaid, to that person at that person's place of residence. Service by publication and the return thereof may be made by the party procuring service or that party's attorney in the same manner as though made by an officer. The party or officer making service shall file an affidavit showing the manner and dates of the publication and mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith. A printed copy of the publication shall accompany the affidavit. If the residence of the party being served is unknown, and for that reason no mailing was made, the affidavit shall so state.

The Arizona Court of Appeals held in *Sprang, id.*, 165 Ariz. at 262, 798 P.2d at 400, (1) a finding of due diligence prior to service by publication is a jurisdictional requirement. In *Preston v. Denkins*, 94 Ariz. 214, 222, 382 P.2d 686, 691 (1963) our Supreme Court held:

It is not the *allegation* that the residence is unknown which confers jurisdiction upon service by publication but the *existence of the jurisdictional fact* that the residence is unknown. *Lown v. Miranda*, 34 Ariz. 32, 267 P. 418:

‘The general statute providing for service of summons by publication requires an affidavit, of the party seeking to obtain such service, to the effect that defendant is a nonresident of, or absent from, the state, or that he is a transient person, or that his residence is unknown to affiant, or that he conceals himself.

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Paragraph 447, Civil Code. Precedent to the right to have constructive service under this statute, the existence of certain facts must be shown, and ‘hence the *fact* and mode of establishing it is jurisdictional.’

Regardless of whether the affidavit must recite a showing of due diligence, such diligence as a fact is prerequisite to the jurisdiction of the court.

The Supreme Court, in characterizing the ability of the plaintiff to locate defendant stated: “This is not a case, as appellant’s brief intimates, of requiring extensive detective work into the whereabouts of strangers.” *Preston v. Denkins, id.*, 94 Ariz. at 223, 382 P.2d at 692. The same rationale applies here. Locating Defendants should not have required “extensive detective work” because Defendants contacted Plaintiff’s counsel after they received her letter which was sent to the Flower Street address.<sup>11</sup> As previously stated, Defendants asserted (1) they lived at the Flower Street address at the time the process server allegedly attempted service; and (2) had lived there since 2008.<sup>12</sup>

III. CONCLUSION.

Based on the foregoing, this Court concludes the Arcadia Biltmore Justice Court erred by allowing Plaintiff to serve by publication in the absence of due diligence.

**IT IS THEREFORE ORDERED** reversing the judgment of the Arcadia Biltmore Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the Arcadia Biltmore Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS

Judicial Officer of the Superior Court

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<sup>11</sup> Plaintiff’s counsel did not include the date Defendants contacted her in the Corrected Declaration.

<sup>12</sup> Defendants’ Appellant [sic.] Memoranda at p. 2.